(221)

UNITED NATIONS

E

Economic and Social Council

Distr.
GENERAL

E/CN.4/1993/106
3 March 1993

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Forty-ninth session
Agenda item 11 (b)

FURTHER PROMOTION AND ENCOURAGEMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, INCLUDING THE QUESTION OF THE PROGRAMME AND METHODS OF WORK OF THE COMMISSION

NATIONAL INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

Letter dated 22 February 1993 from the Permanent Representative of South Africa to the United Nations Office at Geneva addressed to the Assistant Secretary-General for Human Rights

Attached is a copy of the proposals by the South African Government on a Charter of Fundamental Rights.

This document is based on proposals submitted by the South African Law Commission after several years of research and widespread consultations. The South African Government is, however, eager that the process of adoption of such a Charter must be entirely open and transparent. Accordingly, the Government has given an assurance that the final Charter to be adopted for South Africa will be the product of negotiations between all interested parties.

It is thus hoped that the publication of this document will stimulate an active nation-wide debate among all sections of the population in South Africa. All will have an opportunity, and indeed be welcome, to make a contribution to this essential national project by means of their own suggestions or drafts.

GE.93-11614

In addition to the internal deliberations, the South African Government is anxious to expose the proposals to the scrutiny of international experts. Their views and comments will be indespensible in discussing and finalizing the final Charter. With this in mind, I wish to request you to assist us in obtaining authoritative and constructive reactions on these proposals. Any suggestions and/or proposals to improve the draft would be welcome.

May I therefore request your cooperation in having this document circulated to members and delegations attending the current session of the Commission on Human Rights as a document of the Commission.

The South African Government welcomes any comments or suggestions on the proposals you yourself or any other experts or institutions within the United Nations system may have.

You may also be interested to know that on 29 January 1993 South Africa signed the following Conventions:

Convention on the Political Rights of Women (1952);

Convention on the Elimination of All Forms of Discrimination against Women (1979);

Convention on the Nationality of Married Women (1957);

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984);

Convention on the Rights of the Child (1989);

South Africa also acceded to the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962).

Your attention and assistance is greatly appreciated and I thank you for assisting us in making it possible to start engaging in a debate on the merits and contents of the proposals.

(Signed): RIAAN EKSTEEN
Permanent Representative

ANNEX

REPUBLIC OF SOUTH AFRICA

GOVERNMENT'S PROPOSALS

ON A

CHARTER OF FUNDAMENTAL RIGHTS

2 February 1993

ISBN 0 621 14920 9

Introductory remarks

South African constitutional law is based on parliamentary sovereignty. This means that the legislative powers of the South African Parliament is almost unlimited. Parliament has the power to amend or repeal the common law. It can make any law which it in its wisdom finds fit. It can grant rights and privileges or take them away. In the present system Parliament is supreme.

Our history has shown that a constitutional system which grants such wide powers to Parliament cannot guarantee the protection of basic rights. In the past rights have been infringed and unless the system is adjusted fundamentally, there can be no guarantees against future infringements. For this reason the Government is totally committed to a new constitutional dispensation in which the powers of the various branches of state authority, including those of Parliament, will be limited by and subject to certain basic, universally accepted legal norms. A Charter of Fundamental Rights must and shall be one of the most important elements of the new system. A Charter is essential to protect the rights of the citizen against the arbitrary and discriminatory use of Parliamentary and political power. In the new system the Law must reign supreme.

The text of a draft charter with explanatory notes accompanying each provision is contained in this document. The text of the draft charter appears in bold and the notes in ordinary print. The provisions of the draft charter are the Government's proposals of what should be contained in a comprehensive Charter of Fundamental Rights. It must not, however, be seen as the Government's final proposals. It is published to stimulate and to serve as a basis for coming negotiations on the contents of a charter. Obviously comments and proposals aimed at improvement of the proposals will be welcomed. The Government, however, strongly believes that a negotiated charter of fundamental rights must be in place already during the transitional phase.

The draft charter sets out a number of defined rights which persons will enjoy against the State. This list of rights also serves as a standard of values which may not be infringed by the State, whether by legislation or administrative action. In order to grant effective protection to persons, these rights will be entrenched constitutionally so that the State cannot curtail or erode them. The entrenching provisions will be contained in the Constitution.

The draft charter is based on four principles.

Firstly, the principle of verticality. This means that the charter primarily regulates legal relations between the State and the subject. It does not directly regulate legal relations among subjects themselves, although the charter will have an "over-flow" effect on such horizontal legal relations. For instance rights are required by the charter to be exercised responsibly with due regard to the rights of others. Also, the principles of the charter will serve as guide-lines in the interpretation of statutes dealing with legal relations among subjects. These principles will also materially influence the substance of future laws.

Secondly, the principle of negative enforcement. This has the effect that the Charter will apply to the State in a prohibitive rather than in a mandatory sense. That is to say, the State is primarily prohibited from infringing fundamental rights. In certain specified cases the State is, however, required to fulfil particular needs.

Thirdly, the principle of curtailment or limitation of rights. In terms of this principle the State is authorized to curtail rights within reasonable limits.

Chaos will follow if the rights of persons should prevail absolutely. In order to regulate society in the general interest, the State must have the power to delimit such rights in accordance with specific democratic values and norms.

Fourthly, the principle of justiciability. The protection and enforcement of fundamental rights can only be ensured by a strong and independent judiciary. The provisions with regard to the judicial and administrative application of the Charter (and other constitutional measures) are not contained in the draft charter. These provisions dealing with a constitutional court and an ombudsman will be dealt with separately. As a consequence of the Government's proposal that a negotiated charter of fundamental rights should be implemented already during the transitional phase, provision for the constitutional court will have to be made as part of the transitional arrangements.

The fundamental rights set out in the draft charter are based largely on the proposed Charter of Human Rights of the South African Law Commission as published in its Interim Report on Group and Human Rights. Most of the adaptations result from an intensive study of the application of the recommendations of the Commission against the background of practice, the existing statute book and certain policy considerations.

The provisions of the draft Charter of Fundamental Rights follow hereunder with a short explanatory note accompanying each.

INDEX

SECTIONS		*PAGES*
1	Operation of Charter against the State	4
2	Operation of Charter against third parties	4—5
3	Human dignity	5
4	Protection of life	5—6
5	Physical and mental integrity	6
6	Equality before the law	6
7	Citizen's rights	7
8	Political rights	7
9	Freedom of speech	8
10	Meetings, demonstrations and petitions	8
11	Freedom of worship	8
12	Family	8—9
13	Children	9
14	Education and training	9—10
15	Participation in the economy	10
16	Legal competence	10
17	Freedom of movement	11
18	Private ownership	11
19	Employees	11—12
20	Employers	12—13
21	Social security	13
22	Free association	13—14
23	Personal freedom	14—15
24	Detainees	15
25	Accused	16
26	Fair trial	16—17
27	Forced labour	17—18
28	Litigation	18
29	Rules of natural justice	18—19
30	Privacy	19
31	Art and science	19
32	Environment rights	19—20
33	Women's rights	20
34	Culture and language	21
35	Limitation of fundamental rights	21
36	Suspension of fundamental rights	22
37	Absolute prohibitions	22

DRAFT CHARTER OF FUNDAMENTAL RIGHTS

Operation of Charter against the State

1. (1) Every person, including, where appropriate, every legal person and every entity or body or group of persons which can be the bearer of rights, shall have against the State the rights set out in this Charter.

(2) The rights which a person has against the State in terms of subsection (1) are fundamental rights, and the limitation or suspension of these rights shall be permissible only—

(a) **under the common law or by way of a law of a competent legislature; and**

(b) **to the extent provided for in section 35 or 36 or where otherwise expressly authorized.**

(3) The provisions of this Charter shall—

(a) **bind all legislative, executive and judicial institutions, bodies and functionaries at central, regional and local government level; and**

(b) **apply to all laws whether made before or after the commencement of this Charter, and to all executive and administrative actions performed after such commencement.**

Note

This clause deals in general terms with the rights recognized in the Charter.

Firstly, a special status is given to these rights insofar as they are entrenched. As fundamental rights the State accepts them as a limitation of its former sovereign power over its subjects. Together with the other provisions of the Constitution, the Charter forms the supreme law in the Republic. Other laws, and acts performed under such laws, may not be at variance with it, and in this sense parliamentary sovereignty is now replaced by the rule of law guaranteed by a testing right vested in the courts.

Secondly, clause 1 refers to the limitation and suspension of fundamental rights. The limitation and suspension of the Charter are explained under clauses 35 and 36.

Thirdly, room is left to the courts to extend the protection of the Charter in appropriate cases to persons other than natural persons, for example, the property and trading rights of companies.

Fourthly, clause 1 provides that all branches of the State at all levels of government are bound by the Charter so that it will not be permissible for any State authority to act in conflict with it. The Charter will apply to both existing and future laws.

Operation of Charter against third parties

2. (1) No provision of this Charter shall be construed so as to create or regulate legal relations other that those between the State and a person as contemplated in section 1.

(2) In the interpretation of any law regulating legal relations among persons *inter se*, the spirit, objects and purport of this Charter shall be taken into account.

(3) Where a person exercises or enjoys a right recognized by this Charter, such person shall do so in a manner which will not infringe the rights of any other person.

Note

Clause 2 makes it clear that the object of the Charter is not to create or regulate legal relations among persons themselves. The main purpose of the Charter is to protect individuals against abuse of power by State authorities. It is not intended as a direct source of rights or obligations among individuals themselves, for example, to enable a dissatisfied employee to sue his employer on the ground of alleged infringement of his fundamental rights. The Charter is a standard with which the acts of state authorities towards the citizen must comply. The provision also makes it clear that where the Charter grants rights, such rights must be exercised in a responsible manner so that the rights of others are not thereby infringed.

Human dignity

3. The State shall in its legislative, executive and judicial acts respect and protect the human dignity of every person.

Note

The recognition by the State of the human dignity of every individual is regarded as one of the corner stones of justice in a democratic society. All state authorities are charged with the duty to respect the human dignity of the individual in all their acts.

Protection of life

4. (1) Every person shall have the right to life.

(2) No person shall be deprived of his or her life intentionally save in the execution of a death sentence imposed in accordance with section 6 of the International Covenant on Civil and Political Rights.

Note

These provisions entrench the life of a person as a fundamental right of which he may not be deprived. His right to life also entails that the State must provide effective legal protection against murder and homicide by means of appropriate criminal sanctions.

The death penalty is retained as a permissible form of punishment. According to section 6 of the International Covenant on Civil and Political Rights the death penalty may be imposed only for the most serious crimes, but not upon persons under 18 years of age. The death penalty may only be carried out pursuant to a final judgment by a competent court. Every person sentenced to death has the right to seek commutation of the death sentence.

As far as the death penalty is concerned, the Charter leaves the position as it is at present, that is, in the hands of Parliament. A future Parliament can, if it so wishes, abolish the death penalty. And if it has abolished it, it will be free to re-impose the death penalty should public opinion later demand it.

The matter of abortion does not only affect the right to life, but also the right to physical integrity in so far as one school of thought is of the opinion that every woman has the right to make her own decisions regarding her body. At present the matter is regulated by statute, and because of the contentious nature of the problem it is left to the future Constitutional Court to decide on the permissibility of abortion under given circumstances.

Physical and mental integrity

5. Every person shall have the right to physical and mental integrity.

Note

This provision confirms the inviolability of a person's physical and mental integrity. This principle is deeply rooted in our law and protects a person against the unlawful violation of his body and mind by another.

Equality before the law

6. (1) All persons shall be equal before the law and entitled to equal protection by the law.

(2) No person shall be favoured or prejudiced solely by reason of race, colour, language, sex, religion, ethnic origin, social class, birth, political or other convictions, or disabilities or other natural characteristics.

(3) A law shall be deemed not to be contrary to subsection (2) if such law provides for special measures for the sole purpose of furthering the development and advancement of specific communities, groups and individuals to enable them to develop and realize their natural talents and potential to the full and to exercise and to enjoy their fundamental rights on a basis of equality with, and with due regard to the interests of, other communities, groups and individuals.

Note

The object of this prohibition against any form of discrimination is that all shall have equal access to the courts, that all shall be entitled to equal legal remedies if their rights are infringed and that general laws bind all in equal measure. It should be borne in mind that the statute book of the Republic still contains provisions in conflict with this right, for example, laws regarding the present constitutional dispensation, since the latter is based upon race. Suitable measures will have to be taken to provide for the orderly phasing out of remaining inequalities.

In subclause (3) provision is made for so-called "affirmative action". This provision is considered necessary to ensure that, for example, development programmes for disadvantaged communities can be continued and extended. The provision has been formulated to ensure that it does not open the door for the introduction of marxist trends of policies under the ideologically neutral and popular banner of "affirmative action".

Citizen's rights

7. Every citizen shall have the right not to be—

(a) **deprived of his or her citizenship;**

(b) **exiled or expelled from the Republic;**

(c) **prohibited from returning to the Republic;**

(d) **prevented from leaving the Republic, whether temporarily or permanently;**

(e) **denied a passport or deprived thereof.**

Note

Citizenship as proof of the subject's membership of a specific state forms the basis of his political rights in that state. Through citizenship he obtains a say in the election of his government and the management of the country. Clause 7 protects this important right. While the issue of a passport was previously an indulgence on the part of the authorities, it now becomes a right upon which the citizen may insist.

Political rights

8. (1) Every citizen shall have the right to—

(a) **form a political party;**

(b) **join a political party of his or her choosing or not to join a political party;**

(c) **participate or not to participate in the activities of a political party;**

(d) **give expression to his or her political convictions in a peaceful manner;**

(e) **make himself or herself available for nomination for and election to any legislative, executive or administrative office for which he or she qualifies.**

(2) Subsection (1) shall not preclude the prohibition or regulation of participation in politics by persons in the service of the State.

Note

Political rights, which in the nature of things must be confined to citizens of the Republic, include the right to form a political party, to take part in politics and to be nominated for and elected to legislative, executive and administrative posts.

To ensure sound public administration, it may be necessary to prohibit or regulate the participation in politics by persons in the service of the State.

Participation in elections on the basis of universal adult franchise will be dealt with in the Constitution itself.

Freedom of speech

9. (1) Every person shall have the right to freedom of speech and other forms of expression, and the right to obtain and disseminate information.

(2) Subsection (1) shall not preclude the registration and licensing of newspapers and other forms of communication.

Note

It is accepted that freedom of speech forms the foundation of a free, open and democratic society. By acknowledging freedom of speech abuse of power, corruption and maladministration in official and other circles may be exposed. In this manner public debate on policy matters and disputed issues is promoted and so contributes to the search for peaceful solutions.

As in the case of most other rights this right may sometimes have to be limited, for example, where it will amount to defamation of others or where it will be contrary to good morals. Clause 35 provides for the limitation of fundamental rights on account of general considerations.

Meetings, demonstrations and petitions

10. Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to draw up and present petitions.

Note

Freedom of meeting is a basic principle of democracy. In this way grievances of the community or a part thereof may be articulated and brought to the attention of the authorities. However this right is only recognized in so far as it is exercised peacefully and unarmed. Violent meetings and demonstrations are not protected by the Charter.

Freedom of worship

11. (1) Every person shall have the right to profess and practise the religion of his choosing.

(2) Subsection (1) shall not preclude ministration to the forces, the public service and other state institutions, religious instruction or exercise in schools, and religious broadcasts by an entity instituted by or under any law.

Note

In a society where the majority professes religious beliefs, it is considered necessary to make express provision for the rendering of, for example, chaplaincy services to persons in the service or care of the State, and for religious broadcasts by a body instituted by law, for example, the SABC. In view of the provision in clause 14 for religion-orientated education in schools where such education is required by a particular community, clause 11 protects religious instruction or exercise in schools where it is so desired.

Family

***12. Every person shall have the right to the protection of the integrity of* his or her family.**

Note

The family forms the natural and fundamental unit of society and deserves protection by the State.

Children

13. (1) Every parent shall have the right to have his or her child live with him or her and to care for and bring up such child, unless the interests of the child require some other arrangement.

(2) Every child shall have the right—

(a) **not to be compelled to perform work or to render services harmful to his or her physical or mental health, upbringing, education or moral or social development, or which amounts to economic exploitation;**

(b) **not to be compelled to perform work or to render services for the benefit of the employer of the parents of the child or any other person;**

(c) **to protection against physical or mental violence, injury, neglect or abuse, including sexual abuse.**

(3) Every child in need of care shall have the right to medical treatment by medical personnel in the service of the State or at medical institutions managed by the State in so far as such medical treatment is provided or can be provided by the the State with available personnel and facilities.

(4) This Charter shall not be construed so as to affect the powers of the Supreme Court as upper guardian of all minors.

Note

The supreme need of a child, namely, to be cared for and brought up by his parents, is recognized. The child is also protected against exploitation whether for the benefit of his parents or for that of others. Children in need of care acquire the right to receive medical care at public expense.

Education and Training

14. (1) Every pupil or student who is a citizen shall have the right of equal access to state or state-aided educational institutions.

(2) Every pupil who is a citizen shall have the right to religion-oriented education in so far as it is reasonably practicable.

(3) Every pupil who is a citizen shall have the right to tuition in his mother tongue, including the right to take his mother tongue as a subject, in so far as it is reasonably practicable.

(4) (a) Every state-aided tertiary educational institution shall have the right to determine the medium of instruction and the religious and general character of such educational institution.

(b) The parent community of every state or state- aided school shall have the right to determine the medium of instruction and the religious and general character of the school.

(5) (a) Every pupil who is a citizen shall have the right to at least primary education for which the State with due regard to its financial means shall be responsible.

(b) All pupils at a particular level in a state or state-aided school shall have the right to equal state assistance in respect of compulsory education at such level.

(6) Every person shall have the right to establish and operate a private educational institution.

Note

The following principles are laid down.

Every pupil or student, irrespective of race or colour, is entitled to equal access to state and state-aided educational institutions.

Pupils acquire the right to mother tongue education if it is feasible.

A state-aided tertiary educational institution itself determines its medium of instruction and its religious and general character.

The parent community of a state or state-aided school determines the school's medium of instruction and its religious and general character.

Every pupil is entitled to at least primary education at public expense in so far as it is financially feasible, but parents are not thereby relieved of financial contributions. Pupils at a particular level in such institutions have the right to equal state assistance in respect of compulsory education at that level.

A right to operate private schools is acknowledged.

Participation in the economy

15. Every person shall have the right freely and on an equal footing to engage in economic enterprise, including the right to establish, manage and maintain commercial undertakings, to acquire property and means of production, and to offer and accept employment against remuneration.

Note

This clause entrenches the common law freedom of the subject to participate in the economy. The recognition of this right will not prevent measures to prohibit monopolies and restrictive practices and to protect consumers against exploitation.

Legal competence

16. Every person shall have the right to perform juristic acts, and to acquire rights and incur obligations.

Note

This clause guarantees the right of a person with the necessary legal capacity to perform legal acts and to enter into contracts with others in the exercise of his rights and for the advancement of his interests.

Freedom of movement

17. Every citizen shall have the right—

(a) **of freedom of movement and residence in the Republic;**

(b) **to work, to establish and operate any undertaking, to exercise any profession or trade and to carry on any other lawful activity in any part of the Republic.**

Note

Every citizen of the Republic may move freely in the Republic and elect where he wishes to reside and work . This right does not detract from legal requirements regarding travel in the Republic and residence in certain areas. Nor does it permit any person to infringe the rights of others by, for example, unlawful squatting or trespass.

Private ownership

18. (1) Every person shall have the right, individually or with others, to acquire, possess, enjoy, use and dispose of, including disposal by way of testamentary disposition or intestate succession, any form of movable and immovable property.

(2) Subject to the provisions of subsection (3) no person shall be deprived of his property otherwise than under a judgment or order of a court of law.

(3) Property may be expropriated for public purposes, subject to the payment within a reasonable time of an agreed compensation or, failing such an agreed compensation, of compensation in cash determined by a court of law according to the market value of the property.

(4) Every person shall have the right not to be subjected to taxes on property which will have a confiscatory effect or will make unreasonable inroads upon the enjoyment, use or value of such property.

Note

The prospect of acquiring property is the principal incentive to hard work, thrift, responsibility and the development of the individual's full potential. Hence the need to protect his right to acquire property for himself.

Apart from the instances where someone may be deprived of his property by order of a court of law according to the existing law, deprivation can in terms of the Charter only take place through expropriation for public purposes and against payment of an agreed compensation, or of compensation in cash determined by a court of law according to market value. Although reasonable taxes will be permissible, excessive taxation which may force an owner "voluntarily" to abandon his property will be prohibited.

Employees

19. (1) Every employee shall have the right—

(a) **to form an employees' organization, to join such an organization or**

not to join such organization, to participate or not to participate in the activities of such an organization, or otherwise to associate or not to associate or to organize;

(b) **to negotiate or bargain, collectively or individually;**

(c) **to take part in strikes and to withhold labour;**

(d) **not to be subjected to unfair labour practices including intimidation and victimization;**

(e) **to work under safe, hygienic and healthy conditions;**

(f) **to work reasonable hours;**

(g) **to be given a reasonable opportunity for rest, recreation and holiday;**

(h) **to receive reasonable remuneration for his or her labour;**

(i) **to be protected in his or her physical and mental well-being.**

(2) Subsection (1) shall not preclude the prohibition of strikes in strategic industries and essential services or by persons in the service of the State, or the levying of contributions for and the management of provident funds.

Note

A number of principles aimed at the protection of employees and complying with internationally recognized norms of labour law are laid down here.

The right of the State to prohibit in the public interest strikes in strategic industries or by persons in the service of the State is retained.

For the avoidance of doubt it is stated that the levying of contributions for and the management of provident funds are not precluded by the rights in question.

Employers

20. (1) Every employer shall have the right—

(a) **to form an employers' organization, to join such an organization or not to join such organization, to participate or not to participate in the activities of such an organization, or otherwise to associate or not to associate or to organize;**

(b) **to offer employment and to engage employees according to his or her needs with due regard to the fitness, qualifications, level of training and competence of the employees;**

(c) **to require of an employee adequate service of an acceptable quality and to lock out labour;**

(d) **to terminate the services of an employee under the common law, the contract of employment with the employee or legislation, as the case may be;**

(e) **to apply the principle of "no work, no pay";**

(f) to manage his or her business with a view to its economic viability and continued existence;

(g) to make use of alternative labour when necessary to maintain production or service;

(h) not to be subjected to unfair labour practices, including intimidation and victimization.

(2) Subsection (1) shall not preclude the prohibition of labour lock-outs in strategic industries and essential services, or the levying of contributions for and the management of provident funds.

Note

The comments under clause 19 also apply in respect of employers. All the rights in question are in harmony with modern labour law.

Social security

21. (1) Every person shall have the right to safeguard his or her existence or the existence of his of her dependants in the best possible manner by means of pension, medical, assurance or other providence.

(2) The State shall not in any manner make any inroad upon the benefits of such providence.

(3) Every person shall have the right to claim available state assistance to provide for essential subsistence and medical needs where he or she is unable to provide for such needs because of physical or mental illness or disability and where there is no person who is legally liable or who can legally be compelled, to provide for such needs.

Note

This clause deals with the satisfying of certain socio-economic needs. In drafting the Charter the principle was adhered to that only those rights which can legally be enforced, that is, those which a court can compel the State to give effect to, should be included in the Charter. Rights which are merely an expression of ideals, have been avoided since the inclusion of such "rights" would only result in the legitimacy of the Charter as an enforceable and effective instrument being undermined.

Consequently the social security rights were not framed as claims which the individual has against the State, but as freedoms of the individual upon which the State may not encroach whether by legislation or otherwise. There is no obligation upon the State to realize these claims, but an obligation not to violate or endanger them. On the other hand there is nothing in the Charter that prevents the State from fulfilling its social obligations towards its citizens. These obligations the State must fulfil. But the extent to which the State provide social assistance to its citizens must be a political and not a legal matter.

Free association

22. (1) Every person shall have the right of free association.

(2) No person shall be prohibited or prevented from associating with any other person.

(3) No person shall be compelled to associate with any other person.

Note

Certain objectives can better be achieved if a person organizes himself with others in groups, for example, societies. The right to do so is recognized.

The freedom of the individual who prefers not to associate with a particular group is expressly protected.

Personal freedom

23. (1) Every person shall have the right to personal freedom.

(2) Subject to the provisions of section 37 a person may be deprived of his or her freedom only in the following instances and only in accordance with the procedure prescribed by a law of a competent legislature—

(a) **detention of a person for investigation and trial on the ground of a reasonable suspicion that he or she has committed an offence;**

(b) **detention of an accused for or during his or her trial or for sentencing;**

(c) **detention of a person after conviction under a sentence or by order of a court of law;**

(d) **detention of a child by order of a children's court;**

(e) **detention of a person because of non-compliance or alleged non-compliance with the terms of process issued by or under the authority of a court of law, or of a condition or order of a court of law regarding attendance at such court, bail with or without conditions, any sentence or punishment, or any related matter;**

(f) **detention of an accused released on bail and who is about to flee or of a witness evading service of a subpoena or who is about to flee;**

(g) **detention of a recalcitrant witness or of a witness who refuses to divulge information regarding an alleged offence;**

(h) **detention of a witness by order of a judge with a view to the protection of the witness or the proper administration of justice;**

(i) **detention of a person for the prevention of the spreading of infectious diseases constituting a threat to public health;**

(j) **detention of a mentally disordered or suspected mentally disordered person for observation or treatment;**

(k) **detention of a person alleged to be addicted to a narcotic substance or alcohol, for the purpose of an enquiry whether he is so addicted, or of a person who is so addicted, for the purpose of his rehabilitation;**

(l) **detention of a person in connection with his or her unauthorized or alleged unauthorized presence or sojourn in the Republic or for the purpose of his or her deportation;**

(m) **detention of a person for the purpose of extradition;**

(n) **detention of a person by order of a court of law in connection with civil proceedings.**

Note

This clause deals with the right of every person not to be deprived of his freedom and not to be subjected to coercive measures. Because deprivation of freedom by the authorities must surely rank as one of the most serious infringements of a person's fundamental rights, it was regarded as necessary to spell out in detail the grounds upon which the authorities may detain someone. The other circumstances under which a person may be deprived of his freedom are subject to the proviso that such a person may not be detained for more than 10 days without leave or an order of a court of law (see clause 37(d)). This proviso will apply also in the case of detentions under a state of emergency.

Detainees

24. (1) Every person who is detained shall have the right—

(a) **as soon as is reasonably possible to be informed in a language which he or she understands of the reason for his or her detention;**

(b) **to be detained under conditions consonant with human dignity, adequately to be fed by the State and, when necessary, to receive medical treatment at public expense;**

(c) **to be given a reasonable opportunity to communicate and consult with a legal practitioner and, when necessary, a medical practitioner of his or her choosing;**

(d) **to be given a reasonable opportunity to communicate with, and to be visited by, his or her spouse, family, next-of-kin and religious counsellor, unless a court of law orders otherwise;**

(e) **to be released when the reason for detention falls away or, in the case of a person detained for a specific period, at the expiry of the term of detention.**

(2) During detention persons awaiting trail shall, in so far as it is practicable, be separated from convicted persons, and juveniles from adults.

Note

The rights contained in clause 24 are given to all persons detained by the State. Apart from accused persons and prisoners, it also pertains to other categories of detainees such as mentally disordered persons and prohibited immigrants. This clause provides for certain minimum rights for detainees which are calculated to prevent the abuse of power and inhuman treatment on the part of the authorities during detention.

Accused

25. (1) Every person arrested for the alleged commission of an offence shall have the right—

(a) **as soon as is reasonably possible, to be informed in a language which he or she understands that he or she has the right to remain silent and that he or she is not obliged to make any statement, and to be warned of the consequences of making a statement;**

(b) **within a reasonable time, but not later than 48 hours or the first court day thereafter, after arrest, to be brought before a court of law, and to be charged or to be informed of the reason for his or her detention, failing which he or she shall be entitled to be released from detention;**

(c) **to be tried by a court of law within a reasonable time after arrest;**

(d) **upon good cause being shown, to be released from detention with or without bail.**

(2) Any infringement of the rights of an accused mentioned in subsection (1) shall not result in the setting aside of the proceedings unless on appeal or review the court finds that justice has not been done.

Note

The purpose of clause 25 is to ensure that the right to personal freedom of accused persons who are detained, will be affected to the minimum extent compatible with the needs of the administration of justice. The point of departure is that a person arrested must be brought before a court within 48 hours after which the court may watch over his freedom.

Fair trial

26. (1) Every accused shall have the right—

(a) **to a public trial by a court of law;**

(b) **to be presumed innocent until the contrary is proved;**

(c) **to remain silent during plea proceedings or trial and not to testify during trial;**

(d) **where he or she is not assisted by a legal practitioner, to an explanation of the possible consequences of any applicable presumptions and of his or her election to exercise his or her right to remain silent or not to testify;**

(e) **to examine witnesses testifying against him or her, to testify himself or herself, to call witnesses and to offer other rebutting evidence;**

(f) **to be represented by a legal practitioner at own expense;**

(g) **to be informed by the presiding officer regarding—**

(i) his or her right to be assisted by a legal practitioner; and

(ii) the institutions that he or she may approach for legal assistance,

and to be given a reasonable opportunity to attempt to obtain legal assistance;

(h) **not to be sentenced to inhuman punishment;**

(i) **not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;**

(j) **not to be convicted of any offence of which he or she previously been convicted or acquitted on the merits;**

(k) **to have recourse by way of appeal or review to a higher court than the court of first instance;**

(l) **to be informed in a language which he or she understands of the reasons for conviction and sentence;**

(m) **to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her;**

(n) **to be sentenced within a reasonable time after conviction.**

(2) Any infringement of the rights of an accused referred to in subsection (1)(d) or (g) shall not result in the setting aside of the proceedings unless the court on appeal or review finds that justice has not been done.

Note

The clause guarantees certain procedural rights aimed at ensuring that with the trial of an accused person justice is not only done, but can manifestly and undoubtedly be seen to be done. It may fairly be stated that the rights in question have been formulated more comprehensively in this provision than in most existing charters.

These rights also provide that inhuman punishment may not be imposed upon anyone. In the light of prevailing conceptions in other legal systems this will probably entail that corporal punishment, which at present is still a permissible form of punishment in the Republic, will be in conflict therewith and will have to fall away.

Recognition is also given to the internationally accepted principle that an accused should have the right to appeal against his conviction and sentence to a higher court than the court of first instance.

Forced labour

27. (1) Every person shall have the right not to be subjected to forced labour.

(2) For the purposes of subsection (1) "forced labour" shall not include the following—

(a) **the performance of labour by a person serving imprisonment;**

(b) **the performance of community or other service by a person in terms of a sentence or an order of a court of law;**

(c) **the performance of compulsory military service;**

(d) **the performance of civilian service in the place of compulsory military service.**

Note

By "forced labour" is meant labour which someone is compelled to perform under threat of punishment and to which he has not bound himself voluntarily.

For the avoidance of possible doubt subsection (2) provides that labour performed under a sentence of a court, as well as compulsory military service or civilian service in the place thereof, is not regarded as forced labour.

Litigation

28. (1) Every person shall have the right to have any dispute settled by a court of law.

(2) Every person shall have the right that the South African law, including the rules of the South African private international law, be applied in all proceedings before a court of law.

(3) Subsection (2) shall not prevent—

(a) **judicial notice of the law of indigenous groups;**

(b) **the application in civil proceedings of the law of indigenous groups or the religious law of religious groups.**

Note

Subclause (1) recognizes a person's basic right of access to the courts. This right may result in certain statutory provisions in terms of which the authorities may recover damages from someone in a summary manner and without the intervention of a court being invalid. It will also invalidate provisions in terms of which the jurisdiction of the courts is ousted.

Subclause (2) confirms the application of the South African law. Subclause (3) authorizes the application by the courts in appropriate cases of the law of indigenous groups or the religious law of religious groups.

Rules of natural justice

29. Every person shall have the right—

(a) **to have the rules of natural justice applied in administrative proceedings where, on the ground of findings of fact or of fact and law, his or her rights or reasonable expectations are or may be infringed;**

(b) **that in such a case the reasons for any decision be furnished on demand to him or her.**

Note

It has already been held that the two rules here under discussion ("no one may be a judge in his own cause", and, "also hear the other side") form part of our law. In short, the latter rule means that before an administrative organ comes to a decision that may affect the interests of a citizen adversely, such organ must allow that citizen an opportunity to put his side of the case. These rules now become fundamental rights.

Privacy

30. (1) Every person shall have the right to privacy.

(2) A person's right to privacy is infringed also by entering or entering upon his or her property or place of residence or employment, by searching him or her, by seizing his or her property or possessions and by intercepting or obtaining information about his or her correspondence or other forms of communication.

(3) The interception of, or the obtaining of information concerning, the correspondence or other forms of communication of a person shall be permissible only in so far it is authorized by a law of a competent legislature for the purpose of preventing and combating foreign intelligence operations, the illegal trade or trafficking in narcotics and weapons, serious economic offences and the organized sexual exploitation of women and children.

Note

The civil law protects the right to privacy of people among themselves. But the authorities should also respect this right.

The definition of this right in the clause is not exhaustive, but refers only to certain aspects thereof where the danger of infringement is greater, for example, the search of private property and the interception of post.

The latter is permissible only for the prevention and combating of foreign intelligence operations, the unlawful trade in drugs and weapons, serious economic offences and the organized sexual exploitation of women and children.

Art and science

31. Every person shall have the right to practise the arts and science.

Note

The State may not place any obstacle in the way of any person who wants to participate in the arts or science.

Environment rights

32. Every person shall have the right not to be exposed to an environment which is dangerous or seriously detrimental to the health or well-being of man, and the right to conservation and protection of the environment.

Note

In today's world these so-called green rights are considered important enough also to be included. The vertical application of this right will ensure that this right can only be enforced against the State, which will prevent a witch-hunt against private entrepreneurs. However the recognition of this right will have an inhibiting side-effect on private entrepreneurs who disregard the importance of conservation and protection of the environment.

Women's rights

33. (1) All women shall be entitled to equal rights with men.

(2) No law shall in any matter relating to women discriminate, distinguish or restrict on the basis of sex if it has the effect of denying or limiting women's right to equality with men in the political, economic, social, cultural, civil or any other sphere.

(3) Without derogating from the generality of the foregoing every woman shall have the right—

(a) **to be elected to any public office for which she qualifies;**

(b) **to receive equal remuneration with men for work of equal value;**

(c) **not to be discriminated against solely by reason of her marital status or pregnancy;**

(d) **to perform juristic acts, to acquire rights and incur obligations, and to acquire and dispose of property;**

(e) **to her physical and mental integrity and in particular to legal protection against rape and sexual harassment.**

(4) A law shall be deemed not to be in conflict with the right to equality before the law if the object of the said law is—

(a) **to bring about equality between women and men;**

(b) **to protect women in certain types of work in the case of pregnancy or for other reasons inherent in their physical nature;**

(c) **to exempt women from compulsory military service, excluding service in a non-combatant or supporting capacity.**

Note

Although the right to equality before the law is wide enough to protect women's rights inasmuch as it prohibits discrimination also on the ground of sex, a specific provision on women's rights may nonetheless be justified. It must be pointed out, however, that some of these rights, for example, an unqualified right to contract and to deal with property will be in conflict with aspects of the law, culture and customs of indigenous minorities and tribes, and that it is not be intention to force alien values upon them.

The inclusion of these provisions regarding women's rights must be seen against the background of the conventions relating to women and to which the Government subscribes. It is the Government's intention to ratify these conventions in due course. Women's rights are formally settled in separate draft laws in which the remaining statutory discrimination against women is abolished and provision is made for the promotion of equal opportunities for women and the combating of domestic violence.

Culture and language

34. (1) Every person shall have the right to use the language of his or her choosing and to participate in the cultural life of his or her choosing.

(2) Every person shall have the right of communication with the State in the official language of his or her choosing.

Note

Underlying this right is the existence of more than one language and culture group in the Republic. This right will therefore mainly be enjoyed in group connection.

Limitation of fundamental rights

35. (1) A law referred to in section 1(2)(a) in terms of which a fundamental right is limited or the limitation thereof is authorized, shall be permissible only to the extent in which such limitation is reasonably necessary—

(a) **by virtue of state security, the safety of the public, the public order and interest, good morals, public health, the administration of justice or public administration;**

(b) **to uphold the rights and freedoms of others;**

(c) **to prevent or combat disorder, violence, intimidation or crime; or**

(d) **to counter or deal with a threatening or actual natural disaster or the consequences thereof.**

(2) The question whether the limitation of a fundamental right is reasonably necessary shall be justiciable by the Constitutional Court.

Note

In a modern society where it is the task of the law to strike and maintain a balance between the interests of citizens among themselves, as well as between the interests of citizens on the one hand and those of the State on the other hand, certain rights must necessarily be limited or must yield *pro tanto*. For example, while the object of my right to privacy is that no one may enter my home without my permission, the needs of the administration of justice may require that a police officer search my house in a specific instance to trace a criminal in hiding.

The purpose of section 35 is to prescribe standards against which it can be determined if a particular limitation of a fundamental right is permissible. The legislature is strictly bound inasmuch as any limitation must be **reasonably necessary** on the ground of one or more of the considerations mentioned in paragraphs (a) to (d). The Constitutional Court is expressly authorised to determine it any limitation is justified. Should the court find that a limitation is not **reasonably necessary**, the court will declare the law imposing the limitation invalid.

Suspension of fundamental rights

36. (1) A law referred to in section 1(2)(a) in terms of which a fundamental right is suspended of the suspension thereof is authorized, shall be of force only during a state of emergency in which—

(a) **the continued existence of the State or the safety of the public in the Republic or in a part of the Republic is threatened by an actual or threatening war or invasion, an insurrection or general riotousness; and**

(b) **the suspension of that fundamental right is reasonably necessary to ensure the continued existence of the State or the safety of the public.**

(2) The question whether a state of emergency as contemplated in subsection (1) exists, shall be justiciable by the Supreme Court.

Note

The suspension of a fundamental right is only at issue during a state of emergency.

A first requisite is that there must be a state of emergency as defined in section 36(1)(a). Whether such a state of affairs exist, does not end with the opinion of the State President, as is the case at present. The Supreme Court is expressly authorized to verify the factual existence thereof. To this extent the existing law will be invalid or will be interpreted otherwise by the court.

The other requisites of clause 36 can likewise be tested by the court. Thus it must be a fact, objectively seen, that the continued existence of the State is threatened, and that the suspension of the right in question is reasonably necessary to ensure the continued existence of the State.

Absolute prohibitions

37. Notwithstanding anything contained in this Charter no law contemplated in section 1(2)(a) shall regulate or authorize—

(a) **the physical or mental torture or inhuman treatment of persons;**

(b) **the creation of offences with retrospective effect;**

(c) **the indemnification of the State or a person in the service of the State for the unlawful killing or injuring of any person;**

(d) **the detention of any person in circumstances other than those authorized in the specific instances set out in section 23 for a period longer than 10 days without leave or an order of a court of law.**

Note

Notwithstanding provision in clauses 35 and 36 for the limitation or suspension of a fundamental right the legislature is in terms of this clause absolutely prevented from authorizing or permitting the above-mentioned matters. Here it is of importance to note that during a state of emergency a person may not be detained for more than 10 days without leave of an order of a court.

PRINTED BY CREDA PRESS (PTY) LTD. ELIOT AVENUE, EPPING II, CAPE TOWN, FOR THE GOVERNMENT PRINTER, PRETORIA. TEL (012) 323-9731
BB6010/800